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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES J. BAZARIAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT'S DELIVERY OF AN ALLEN CHARGE TO THE JURY, ON THE 6TH DAY OF DELIBERATIONS, IN THE ABSENCE OF DEFENDANT AND HIS COUNSEL AND WITHOUT ANY PRIOR NOTICE TO THEM, VIOLATES DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDING AGAINST HIM, AND TO RECEIVE DUE PROCESS OF LAW AND THE ASSISTANCE OF COUNSEL AT SUCH PROCEEDING?

II. WHETHER THE TRIAL COURT'S HANDLING OF THE JURY VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO RECEIVE AN UNANIMOUS VERDICT OR TO A HUNG JURY?

III. WHETHER THE JURY'S VERDICT IS BASED UPON INSUFFICIENT EVIDENCE?

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OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 871 F.2d 957 (11th Cir. 1989) and is styled, *United States v. Rapp.*

JURISDICTION

The Judgment of the Court of Appeals was entered on April 27, 1989, affirming Petitioner's convictions herein. This Petition is filed within sixty (60) days of that decision and is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The fundamental rights to be present at every critical stage of the trial proceeding with the assistance of counsel, to receive a fair trial and due process of law, and to receive an unanimous verdict are implicit in article III, Section 2 of the United States Constitution, and are guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On October 16, 1986, the Grand Jury returned an Indictment charging BAZARIAN and seven others with conspiracy to defraud a federally insured financial institution, the Florida Center Bank ("Florida Center"), and further charged BAZARIAN, on an accomplice liability theory, with the substantive crimes of Bank Fraud (Count Two), Wire Fraud (Count Three), Interstate Transportation of Monies Obtained by Fraud (Count Four), and Misapplication of Bank Funds (Count Six). Count One of the Indictment—the Conspiracy Count—charges that BAZARIAN and all other trial defendants knowingly conspired and agreed to violate the general, Federal conspiracy statute, 18 U.S.C. § 371, through the commission of one or more of six separate substantive crimes, the four crimes BAZARIAN was charged with committing in the substantive Counts lodged against him, plus violations of 18 U.S.C. § 1014 (False Statements to a Bank) and 18 U.S.C. § 1005 (False Entries in the Books of a Bank).

Count One of the Indictment further alleges, in paragraph 16 thereof, that BAZARIAN and the other trial defendants "engaged in a scheme and artifice to defraud Florida Center by financing the purchase and sale of the bank's stock through a fraudulent and spurious loan transaction with Pace-Com, Inc." Moreover, the gravaman of the Indictment is contained in paragraph 18 thereof, which alleges that:

> Defendants Michael Rapp and William Smith, aided and abetted by defendants Charles J. Bazarian and Mario Renda, attempted to purchase and did purchase through Clyde B. Pitchford and defendant Hugh Wiley a controlling interest in Florida Center Bank utilizing funds derived in whole or in part from a fraudulent and spurious loan transaction between the bank and Pace-Com, Inc., said loan transaction having been capitalized by federally insured deposits brokered into Florida Center Bank.

The essence of the conspiracy alleged in Count One of the Indictment was a fraudulent scheme created by all eight Defendants to defraud Florida Center by financing the purchase and sale of Florida Center's stock through a "fraudulent and spurious" loan transaction with Pace-Com, a company recently created by trial Co-Defendant MICHAEL RAPP to commence business in the newly deregulated pay telephone industry. According to the Government's theory of the case, Florida Center was a perfect target for this scheme because recent audits by the F.D.I.C. indicated serious problems with Florida Center's loan portfolio which, if not quickly corrected, would result in the insolvency of the bank. Accordingly, the Government alleged Defendant RAPP and others created a fraudulent transaction which would, at first blush, appear to resolve the capital problems faced by Florida Center and would, therefore, be attractive to that bank.

To this end, the Government alleged that Defendants BODZIAK and DUNCAN, board members of Florida Center, aided and abetted by Defendant MASSARI, an attorney, conspired to sell a portion of the bank's stock to Government witness and unindicted co-conspirator, CLYDE B. PITCHFORD and Defendant HUGH WILEY, as nominees of Defendant RAPP, for an inflated price. The Government further alleged that Defendants SMITH and RAPP, associated with Pace-Com, aided and abetted by Defendants BAZARIAN and RENDA, purchased a controlling interest in Florida Center by utilizing PITCHFORD and WILEY and "funds derived in whole or in part from a fraudulent and spurious loan transaction between the bank and Pace-Com". In short, the Indictment alleged that all eight Defendants conspired to defraud Florida Center through the combination of the Pace-Com loan and the purchase of Florida Center stock by PITCHFORD and WILEY.

The main Government witness at trial was CLYDE B. PITCHFORD. PITCHFORD testified that, on or about October 18, 1985, he first met Co-defendants BODZIAK and DUNCAN and other individuals representing Florida

Center. At that time, PITCHFORD represented himself as a potential investor in Florida Center who was a substantial individual in his own financial right with interests locally in horsing-related activities in nearby Ocala, Florida. At about the same time, Co-Defendant WILLIAM SMITH and others representing Pace-Com presented a proposal to Florida Center for a $30 million loan to Pace-Com so that Pace-Com could enter the pay telephone industry with Florida Center as a participating partner.

According to the terms of the loan, Florida Center would be secured in various ways, including having a UCC interest in all its assets, utilizing Brinks Security to empty the coins from the various pay telephones and deposit the funds in a bank account controlled by Florida Center, participating in the profits of Pace-Com, being able to require a "hold back" of approximately $2 million from the $30 million loan, which proceeds were designated solely for the purchase of pay telephones in the future, and an assignment in all Pace-Com's present and future assets and business. In addition, part or all of the loan to Pace-Com would be collateralized by certificates of deposit, with the interest pre-paid and with Pace-Com waiving any right to require early cancellation of the ten-year period of the certificates of deposit.

Other witnesses testified that, prior to approving the Pace-Com loan, Florida Center obtained a consulting report concerning the viability of Pace-Com and at least two legal opinions concerning the legality of the proposed transaction. Based on all of the foregoing, Florida Center decided to make the loan. In fact, on October 21, 1985 Florida Center made a $250,000 start-up loan to Pace-Com. As of October 21, 1985, BAZARIAN had not yet entered the Florida Center Pace-Com picture in any way.

In any event, sometime during the period between October 21 and October 26, 1985, the principals of Pace-Com lost investor interest and began to seek substitute investors, leading them to CHARLES BAZARIAN. On

Saturday, October 26, 1985, Co-Defendants RAPP and SMITH and Government witness PITCHFORD flew from Miami, Florida to Oklahoma City, Oklahoma and proceeded to BAZARIAN's home in an attempt to obtain BAZARIAN's consent to provide a one-day loan to Pace-Com. It was on that day, Saturday, October 26, 1985, that BAZARIAN's direct "involvement" in the events underlying the charges contained in the Indictment in this case occurred.

PITCHFORD described an extremely short meeting at BAZARIAN's home in Edmund, Oklahoma, on October 26, 1985, while BAZARIAN was preparing his home for a huge Halloween party that night. Addressing BAZARIAN initially, RAPP began to make a "presentation for the loan", but soon turned his attention to BAZARIAN's friend, Co-defendant MARIO RENDA, however, because BAZARIAN "indicated that he was going to take the advise of MARIO RENDA, that he didn't completely understand these things sometimes, and would MR. RENDA listen and render an opinion".

RAPP only discussed at this meeting the financial concept of "renting money". Stated another way, RAPP never disclosed at this meeting, or at any other time, the interrelationship between the "renting of money" and the purchase of stock in Florida Center. In explaining the concept of "renting money", RAPP stressed to RENDA that BAZARIAN would receive a fee of about $300,000 for providing to Pace-Com the sum of $20 million for one day under circumstances that would not involve any risk to BAZARIAN because repayment of the loan would occur at the same time, or prior to, release of the instruments representing BAZARIAN's loan. Based upon the foregoing, BAZARIAN ultimately agreed that his company, C.B. Financial Corp., would make Pace-Com a loan of $10 million for one day, for a fee of 3% or $300,000.00.

One other witness testified concerning the meeting in BAZARIAN's home on October 26, 1985, and events occurring subsequent to that meeting and related thereto.

That witness was Eddie Dean Mittlestet, the then President of United Federal Savings and Loan ("United Federal") located in Durant, Oklahoma, the main banker for BAZARIAN and his corporation, C.B. Financial Corporation. Mittlestet testified that he was present in BAZARIAN's home when PITCHFORD, RAPP and SMITH arrived there during the afternoon of October 26, 1985. After initially meeting these guests, Mittlestet returned to watching his alma mater, Oklahoma State University, beat Kansas in a football game on television and was not directly involved in any conversation. However, at one point during the game BAZARIAN called Mittlestet over to the company of the aforementioned individuals including RENDA, PITCHFORD, RAPP and SMITH, and asked Mittlestet if he (BAZARIAN) could write a $10 million check. Mittlestet responded that "if he would quit writing checks for a few days, he probably could".

The next day, Sunday, October 27, 1985, BAZARIAN told Mittlestet that C.B. Financial was making a one day loan to Pace-Com in the amount of $10 million and requested that Mittlestet take a United Federal Savings and Loan cashier's check in that amount to Orlando, Florida, the following day, Monday, October 28, 1985, to effectuate this transaction. At that time, BAZARIAN informed Mittlestet that C.B. Financial did not have $10 million in its account, but that a wire would come in to United Federal to cover the checks prior to the time that the checks cleared United Federal through the Federal clearing system. Mittlestet further testified that he agreed to accommodate BAZARIAN in this regard because BAZARIAN and his company were the largest personal and corporate clients of United Federal at the time, because he knew that, if necessary, United Federal could recoup the $10 million advance from an existing $25 million loan to C.B. Financial that had not yet been fully funded, and that, in any event, he knew that C.B. Financial Corporation was then a substantial company worth

"in excess of $200 million", and that BAZARIAN personally then had a net worth in excess of $30 million.

On Monday, October 28, 1985, Mittlestet obtained two $5 million United Federal Cashier's checks from his bank and then flew to Orlando, Florida. Mittlestet considered the two $5 million cashier's checks to be direct obligations of United Federal and described those checks as being "as good as gold", an opinion never disputed by any witness at the trial.

Although the checks were unfunded when drawn earlier in the morning of October 28, 1985, BAZARIAN had assured Mittlestet that the checks would be funded later that day by a wire transfer or, in the alternative, that United Federal could simply debit C.B. Financial's revolving loan credit line with United Federal, the balance of which was large enough to fund the cashier's checks. In this regard, Mittlestet testified that it was his understanding that the loan from Florida Center to Pace-Com and the repayment of C.B. Financial's loan to Pace-Com would be simultaneous transactions.

Two other Government witnesses also testified, in part, concerning the two $5 million cashier's checks carried to Florida Center by Ed Mittlestet. These witnesses were Florida Center employees Terry Patterson and Georgianna Peterson.

In this regard, Florida Center employee Terry Patterson testified that he met Ed Mittlestet at Florida Center on the morning of October 29, 1985, and later observed Mittlestet in possession of two unsigned, $5 million cashier's checks. Later that morning, Patterson testified that he telephoned United Federal Savings and Loan, Mittlestet's bank, to verify both the identity of Mittlestet and his authority to sign the two checks in his possession. As a result of this telephone call, Patterson learned that Mittlestet was, indeed, the President of United Federal and did, in fact, have the authority to sign those checks. This conversation removed any concern Patterson had about the validity of the checks.

Later that day, Florida Center employee Georgianna Peterson separately telephoned the Federal Home Loan Board in Topeka, Kansas, the correspondent bank for United Federal Savings and Loan, to inquire concerning the status of United Federal's relationship with the Federal Home Loan Board in Topeka. During that conversation, Ms. Peterson learned that the Federal Home Loan Board would honor any cashier's checks issued by United Federal.

Finally, Mr. Patterson admitted, on cross-examination, that what really upset him concerning the way in which the Pace-Com loan transaction occurred was that Florida Center had to wire $10.3 million to United Federal in return for the $10 million worth of cashier's checks received from United Federal, thereby causing Florida Center to lose the benefit of the "float" for the two days that it took those two cashier's checks to clear through the Federal banking system. In so testifying, Patterson agreed that one of the lawful ways that a bank makes money is on the "float", and, essentially, that United Federal had outsmarted Florida Center in connection with this transaction as far as earning approximately $5,200 on the float of the $10 million was concerned.

As it eventually turned out at the closing on October 29, 1985, Co-Appellant BODZIAK and Government witness PITCHFORD used one of the United Federal $5 million cashier's checks to fund PITCHFORD's purchase of Florida Center stock. No one testified that BAZARIAN authorized, or even knew of, that use of his company's funds. In an attempt to later justify that use of that $5 million check, PITCHFORD created a false loan document to be executed by him and BAZARIAN concerning the $5 million check, even though PITCHFORD admitted that he had never negotiated with BAZARIAN or his company, C.B. Financial Corporation, for that loan. Neither BAZARIAN nor C.B. Financial Corporation ever signed that note.

On January 26, 1987, after the Government rested its case, the Court granted BAZARIAN's Motion for Judg-

ment of Acquittal only as to Count Four. The Court also granted Motions for Judgment of Acquittal as to certain Counts as to the other trial Defendants, and attempted to resolve the persistent severance problems in the case by improperly granting the Motion for Judgment of Acquittal of trial Defendant and bank director ROBERT DUNCAN on all Counts.

Thereafter, at the request of Co-Defendants RAPP and SMITH, made in an attempt to minimize any further severance problems in this complex trial, the trial court bifurcated the trial of the remaining seven defendants and immediately submitted the case to the jury as to Defendants RAPP and SMITH only. On January 28, 1987, the jury found Co-Defendants RAPP and SMITH guilty of numerous Counts each, although during jury deliberation in response to a question posed by the jury, and with the consent of the Government, the trial court removed Counts Five and Six of the Indictment from consideration by the jury and dismissed them.

Directly before the remaining Defendants, BODZIAK, MASSARI, WILEY, BAZARIAN and RENDA, presented their defense, the Court gratuitously instructed the jury with respect to DUNCAN's absence as follows:

> At the close of the Government's case the Court found as a matter of law that the Government had introduced insufficient evidence for you to find beyond reasonable doubt that Mr. Robert Duncan had done any criminal acts as alleged in the Indictment. Therefore, the Court has dismissed Mr. Duncan from the suit.

Directly after the Court delivered this instruction, Co-defendant MASSARI's counsel moved for a mistrial based on the following grounds:

> Judge, I have concerns about the Court's instruction and I would move for a mistrial based on what Your Honor has instructed the jury. In effect, you have told the jury that you have found as a matter of law beyond reasonable doubt that Mr. Duncan was not guilty of anything and he's no longer in the case,

> thereby inferring to the jury and implying that with Mr. Massari there is sufficient evidence to convict him on the charges contained against him.

BAZARIAN joined in this Motion and requested a curative instruction, and the Trial Judge denied both such requests.

Trial continued as to BAZARIAN and the remaining Defendants on January 29, 1987. During the defense case, BAZARIAN presented the testimony of several witnesses, including retired astronaut, Lt. General Thomas Stafford, concerning the business operations of C.B. Financial Corporation and BAZARIAN. Essentially, these witnesses testified that C.B. Financial operated as an unregulated bank, making loans to some, participating in loans with others, and acting as a venture capitalist in helping businesses get off the ground quickly.

On February 3, 1987, the Court considered renewed Motions for Judgment of Acquittal and granted the motion as to Co-Defendant DOMINIC MASSARI. The Court denied the motions as to the remaining four Defendants, BODZIAK, WILEY, BAZARIAN, and RENDA.

During the charge conference that next ensued, the trial court granted Defendants' request to instruct the jurors that to return a guilty verdict on the conspiracy charge, the jurors must unanimously agree as to which of the six offenses charged in Count One of the Indictment a particular defendant conspired to commit. The essence of that charge is as follows:

> In this instance, with regard to the alleged conspiracy, the Indictment charges that the Defendants conspired to commit several offenses. In fact, Court One charges that the Defendants conspired to commit six separate, and distinct, substantive crimes or offenses. In such a case, it is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit each of those substantive offenses. It would be sufficient if the Government proved, beyond a reasonable doubt, that

> the Defendant willfully conspired with someone to commit *one* of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon *which* of the various offenses the Defendant conspired to commit. If you cannot agree in that manner, you must find the Defendant not guilty.

During the charge conference, Defendants requested that the jury be given a suggested Special Verdict Form so that there would be no question whatsoever as to which offense the jurors unanimously agreed that a particular Defendant committed. At this juncture in the trial, it was either factually or legally impossible for the jurors to conclude that BAZARIAN had conspired to commit at least three of the six substantive crimes enumerated in Count One of the Indictment, those being the Transportation in Interstate Commerce violation of 18 U.S.C. § 2314 set forth in subsection (c), the false entries in the Florida Center Bank books violation of 18 U.S.C. § 1005 set forth in subsection (d), and the knowingly false statements in connection with influencing the Florida Center Bank on a loan in violation of 18 U.S.C. § 1014 contained in subparagraph (e) of the Indictment. The Court denied the request for a Special Verdict Form.

The jury commenced deliberations on February 3, 1987, and deliberated until February 11, 1987, when it returned guilty verdicts as to BAZARIAN on Counts One, Two and Six, and a not guilty verdict as to Count Three. During the course of deliberations, however, the jury sent numerous notes to the trial court and received responses thereto. These notes revealed that serious confusion existed in the jury room concerning interpretation of the Court's instructions.

The jury's third question, on the fifth day of deliberations, on February 9, 1987, inquired "if in Count One we can't come to a unanimous agreement on the various offenses . . . should we give a verdict of not

guilty." Judge Sharp essentially responded in the affirmative to this question.

Sometime during the morning of the next day, February 10, 1987, the sixth day of jury deliberations, the jury sent the following note, which the Court, for the first time, did not reveal to counsel before the Court delivered an *ex parte*, supplemental instruction to the jury consisting of a modified *Allen* Charge:

> We the jury cannot render a unanimous decision on the Counts of Mr. Bazarian or Mr. Renda.
>
> We the jury have decided on all Counts concerning Mr. Wiley and Mr. Bodziak. What should we do from here?

Not until after counsel for all Defendants filed a handwritten motion to obtain a copy of the jury question and the Court's response, and the passage of several hours from the time those events occurred, did counsel obtain both a copy of the question and response and an opportunity to appear before Judge Sharp in connection therewith. At that time, BAZARIAN moved for a mistrial because the Court improperly delivered the modified *Allen* charge, and additionally suggested that the Court provide a supplemental charge to the jury reinforcing its earlier charge that the jury should return a not guilty verdict as to BAZARIAN on Count One of the Indictment if it could not unanimously decide which offense listed in Count I BAZARIAN committed. BAZARIAN also again requested that the Court use a Special Verdict Form. The Court denied the Motion for Mistrial and refused to give the supplemental charge or use the Special Verdict Form. In so doing, however, the Court noted that any further indication from the jury that it could not unanimously agree as to which offense BAZARIAN conspired to commit would be "tantamount to an acquittal."

As stated above, the next day, February 11, 1987, and without further inquiry from the jury, the jury reached a verdict as to all four Defendants.

On March 16, 1987, the trial court sentenced BAZARIAN to a two year prison term plus a $100,000 fine. MR. BAZARIAN has been at liberty on a $50,000.00 Corporate Surety Bond during the Appeal to the Eleventh Circuit, but expects to receive an Order requiring him to surrender to commence his prison sentence sometime soon, unless either the District Court or this Court grants him permission to remain at liberty on bond pending disposition of this Petition.

On Appeal to the United States Court of Appeals for the Eleventh Circuit, the Eleventh Circuit affirmed BAZARIAN's convictions on all Counts. In so doing, the Eleventh Circuit concluded that the Government presented sufficient evidence to support BAZARIAN's convictions and that the errors committed by Judge Sharp during the jury instruction and deliberation phase of the case, and in handling the dismissal of Co-Defendant DUNCAN from the case, were harmless under the circumstances.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE TRIAL COURT'S DELIVERY OF AN ALLEN CHARGE TO THE JURY, ON THE 6TH DAY OF DELIBERATIONS, IN THE ABSENCE OF DEFENDANT AND HIS COUNSEL AND WITHOUT ANY PRIOR NOTICE TO THEM, VIOLATES DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDING AGAINST HIM, AND TO RECEIVE DUE PROCESS OF LAW AND THE ASSISTANCE OF COUNSEL AT SUCH PROCEEDING?

The decision of the United States Court of Appeals for the Eleventh Circuit in this case represents a misapplication of the legal principles enunciated by this Court in *Rushen v. Spain*, 464 U.S. 114, 120 (1983), *Rogers v. United States*, 422 U.S. 35, 39 (1975) and *Shields v. United States*, 273 U.S. 583, 587-88 (1927).

This error requires reversal of Petitioner's convictions, and the granting of a new trial on all Counts contained in the Indictment against him.

Rule 43 of the Federal Rules of Criminal Procedure provides that a Defendant has the right to be present "at every stage of the trial including the empanelling of the jury and the return of the verdict." The Fifth and Sixth Amendments to the United States Constitution guarantee to each Defendant the right to be present at all critical stages of the proceeding against him, with the assistance of counsel, and to receive due process of law and a fair trial.

In *Rogers v. United States*, *supra*, 422 U.S. at 39, this Court explicitly set forth the procedure to be followed by a Trial Judge in handling messages from the jury during deliberations, when it held:

> "Cases interpreting the Rule [43] make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's message should have been answered in open court and that Petitioner's counsel should have been given an opportunity to be heard before the Trial Judge responded."

In *Rushen v. Spain*, *supra*, 464 U.S. at 120, although in a different factual context, this Court cited the *Rogers* decision with approval, and distinctly summarized the holding in *Rogers* as follows:

> "Although violation of Federal Rule of Criminal Procedure 43 may be harmless error, additional instructions from Judge to jury, without notification to Defendant or his counsel, is not".

BAZARIAN contends that the decision of the Eleventh Circuit in this case violated the warning contained in *Spain* that additional instructions from a Judge to a jury, without notification to Defendant or his counsel and a prior opportunity to be heard, may not ever be considered harmless error. For this reason, BAZARIAN

maintains that all his convictions must be reversed, and he must be afforded a new trial on all such Counts.

However, there are two (2) aspects of the decision of the Eleventh Circuit that may have a bearing on whether this Court determines to grant this Petition for a Writ of Certiorari. The first such aspect concerns whether the violation of BAZARIAN's right to be present with the assistance of counsel at the time that Judge Sharp delivered the supplemental instruction to the jury is of constitutional dimension. The second such aspect concerns whether, assuming that a constitutional violation of BAZARIAN's right to presence and assistance of counsel occurred, such violation can be considered harmless under the circumstances.

BAZARIAN maintains that this Court's decision in *Rogers* makes clear that a Defendant has a constitutional right to be present with the assistance of counsel at any time that a Judge delivers additional instructions to a jury during the course of jury deliberations, in response to a message received from the jury. In *Spain*, this Court hinted, however, that this issue remains open for resolution in this Court. 464 U.S. at 117. Moreover, the Eleventh Circuit in this case assumed, but did not decide, that Judge Sharp's error in handling the jury deliberation phase of this case was of constitutional dimension. 871 F.2d at 966, fn.15.

With respect to the harmless error analysis, BAZARIAN maintains that neither the Government in its Brief and argument in the Eleventh Circuit, nor the Eleventh Circuit in its opinion, satisfied the requirement that the Government demonstrate that Judge Sharp's error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967) ("the beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.") *See also, Satterwhite v. Texas*, 484 U.S. ——, 108 S.Ct. 1792, 1797 (1988)

("We generally have held that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand.")

Rather, both the Government and the Eleventh Circuit improperly required BAZARIAN to demonstrate that he had suffered some form of prejudice as a result of Judge Sharp's trial error. *See United States v. Rapp*, *supra*, the opinion below, 871 F.2d at 967. BAZARIAN suggests that there is a large difference between requiring the Government, on one hand, to demonstrate that an error is harmless beyond a reasonable doubt, and requiring BAZARIAN, on the other hand, to demonstrate that he had suffered some prejudice resulting from the error.

In any event, Judge Sharp's error committed in this case cannot be harmless beyond a reasonable doubt for several reasons. First, this Court may infer that Judge Sharp deliberately violated BAZARIAN's right to presence and the assistance of counsel in handling the particular jury message at issue here in an *ex parte* manner. In this regard, the jury note ~~in~~ question came on the sixth day of jury deliberations. In the preceding five days of deliberations, the jury had sent four (4) separate questions to Judge Sharp. Each time, Judge Sharp copied the jury's question and his proposed response thereto, and assembled Defendants and their counsel in open court to discuss each question and proposed response. In fact, after such Hearings and with respect to several of the first four (4) messages, the response that Judge Sharp eventually delivered to the jury was different from the response Judge Sharp initially proposed with respect to that question.

Thus, Judge Sharp clearly knew the procedure that he was required to follow in responding to jury messages delivered during jury deliberations, for he had followed that procedure with respect to the first four (4) mes-

sages received from the jury during the first five (5) days of deliberations. Moreover, in two (2) prior cases, the Eleventh Circuit had already rebuked Judge Sharp for failure to follow the correct procedure in responding to jury messages. *See United States v. Guida*, 792 F.2d 1087 (11th Cir. 1986) and *Bank South Leasing v. Williams*, 778 F.2d 704 (11th Cir. 1985).

As a result, Judge Sharp's decision to deliver a supplemental instruction to the jury in the absence of Defendant and his counsel should be viewed as inherently suspect under the circumstances of this case. Since there is no transcript of the meeting between the judge and the jury at which time Judge Sharp delivered the supplemental instruction in this case, no one will ever know whether Judge Sharp said anything to the jury beyond delivering to them the supplemental *Allen* charge (*Allen v. United States*, 161 U.S. 492 (1896)), a copy of which is contained in the Record on Appeal. More importantly, however, no one will also ever know the manner in which Judge Sharp delivered that charge, including the tone of voice he used and any facial expressions that accompanied the delivery of that charge.

It must be remembered that this jury had already expressed that it was deadlocked with respect to BAZARIAN on the previous day, when it delivered another message to Judge Sharp. That prior message, delivered on the fifth day of jury deliberations, stated "if in Count One we can't come to a unanimous agreement on the various defendants . . . should we give a verdict of not guilty." Judge Sharp had essentially responded to that question by answering it in the affirmative. Despite that admonition, the following day, the jury delivered the following note to Judge Sharp, which is the note that he responded to in the absence of Defendant and his counsel and without prior notification to them:

> We the jury cannot render a unanimous decision on the Courts of MR. BAZARIAN or MR. RENDA.

> We have decided on the Counts concerning MR. WILEY and MR. BODZIAK. What should we do from here?

It is apparent that this jury was confused at this point concerning proper application of the Court's instructions previously given to them. The day before, the jury had inquired what to do if they were unable to reach a unanimous agreement as to MR. BAZARIAN. After being instructed that it should return a not guilty verdict as to Count 1 in the absence of unanimity, the jury next inquired what they should now do since they could not "render a unanimous decision on the Counts of MR. BAZARIAN." Despite this obvious confusion, the Eleventh Circuit concluded that Judge Sharp's error in delivering a supplemental instruction to the jury consisting of the much-criticized and coercive *Allen* charge, *see United States v. Rey*, 811 F.2d 1453, 1458-60 (11th Cir.) *cert. denied*, 484 U.S. ——, 108 S.Ct. 103 (1987), without the presence of BAZARIAN or his counsel, or any input from them at this most critical juncture in the trial, was harmless under the circumstances essentially because Judge Sharp, in a later Hearing, rejected BAZARIAN's Motion for Mistrial and Request for Additional Instructions. 871 F.2d at 967.

This Court must recall that BAZARIAN and his counsel were able to obtain a Hearing before Judge Sharp after learning that Judge Sharp had delivered the *Allen* charge to the jury only through filing a handwritten Motion requesting such a Hearing and a copy of the supplemental instruction. Several hours later, during a break in another trial Judge Sharp was then conducting, he presided over an extremely brief Hearing in this case and simply denied all requests for a mistrial or any other curative measures, without much discussion whatsoever. In these circumstances, BAZARIAN maintains that Judge Sharp's erroneous decision to deliver the *Allen* charge to the jury in the absence of BAZARIAN and his counsel clearly prejudiced him here by depriving

BAZARIAN and his counsel of any *timely* opportunity to provide alternative solutions to Judge Sharp at a time when it would have made a difference.

It is one thing to convince a Judge of the error of his proposed way before the Judge commits the error: it is quite another matter entirely to convince a Judge to reverse what he already has done four or five hours after he has done it. Perhaps the best evidence that counsel could have convinced Judge Sharp to do something other than simply deliver the modified *Allen* charge is Judge Sharp's own concession that he would do something different if the jury again raised the question. In this regard, during the brief Hearing following delivery of the *Allen* charge, Judge Sharp did remark that any further indication from the jury that it could not reach a unanimous decision concerning BAZARIAN would be "tantamount to an acquittal."

In light of the back-to-back jury questions demonstrating their deadlock as to BAZARIAN, Judge Sharp's *sua sponte* decision to deliver the *Allen* charge to the jury without notification to BAZARIAN or his counsel, and in their absence, deprived BAZARIAN of any meaningful opportunity to address the jury's confusion and the appropriate response thereto. BAZARIAN submits that Judge Sharp's delivery of the *Allen* charge to the jury in this case, under these circumstances, was prejudicial *per se*. By using the *Allen* charge, Judge Sharp told the jury, that had recently twice told him it could not reach a verdict as to BAZARIAN, to return to the jury room and do just that. Moreover, Judge Sharp provided that instruction to the jury in the absence of BAZARIAN and his counsel, or even a court reporter. Due to the procedure Judge Sharp knowingly selected to use at this point in this case, how can BAZARIAN now demonstrate prejudice in the absence of any tools with which to do so? The decision of the Eleventh Circuit Court of Appeals in this case that Judge Sharp's error was harmless under

the circumstances is wrong, and is in direct conflict with the decision of the Second Circuit Court of Appeals in *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1980).

In *Ronder*, the trial court delivered an *Allen* charge in response to a jury note without first informing counsel of the contents of the note. The Second Circuit reversed, despite the fact that defense counsel had not requested any additional instruction upon finally reading the note.

Moreover, Judge Sharp's decision to deliver the *Allen* charge to the jury under the circumstances he chose in this case amounted to a denial of counsel at a critical stage in BAZARIAN's trial. As this Court held in *United States v. Cronic*, 466 U.S. 648, 659 (1984): "the presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." Similarly, in *Chapman v. California*, *supra*, this Court recognized that the right to counsel is "so basic to a fair trial that [its] infraction can never be treated as harmless error." 386 U.S. at 23 and n.8. More recently, in *Satterwhite v. Texas*, *supra*, 486 U.S. ——, 108 S.Ct. 1792, 1797 (1988), this Court stated that a pervasive Sixth Amendment denial of counsel casts such doubt on the fairness of the trial process, that it can never be conidered harmless error.

Thus, this case is unlike other cases in which this Court has held that a Sixth Amendment violation was harmless when it involved erroneous admission of particular evidence at trial, for in those circumstances the effect of the Sixth Amendment violation was limited to admission of certain evidence only. *See, generally, Milton v. Wainwright*, 407 U.S. 371 (1972) (admission of a confession obtained in violation of *Massiah v. United States*, 377 U.S. 201 (1964)), *Moore v. Illinois*, 434 U.S. 220 (1977) (admission of identification testimony obtained in violation of the right to counsel at a post-Indictment lineup).

Here, BAZARIAN submits that Judge Sharp's denial of counsel to him at the most critical stage of his trial—a time when his confused jury cried out for additional instructions—resulted in a contamination of the entire criminal proceeding against him, and cannot be considered a harmless Sixth Amendment violation. Nor can a post-violation Hearing suffice to cure the prejudice that occurred, at least in this case under the particular circumstances here involved. In assessing the utility of that Hearing, this Court must recall that this jury had earlier been bifurcated and had already found Co-defendants RAPP and SMITH guilty. In addition, Judge Sharp had already erred, as the Eleventh Circuit below suggested, in *sua sponte* instructing the jury that the Court had dismissed Co-defendant DUNCAN from the case because the Government presented insufficient evidence against him without also instructing the jury that such dismissal had no bearing on the case of the remaining defendants. 871 F.2d at 968. *See United States v. DeLucca*, 630 F.2d 294, 298 (5th Cir. 1980).

For all of the foregoing reasons, BAZARIAN's convictions on all Counts must be reversed, and the case remanded for a New Trial.

II. WHETHER THE TRIAL COURT'S HANDLING OF THE JURY VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO RECEIVE AN UNANIMOUS VERDICT OR TO A HUNG JURY?

BAZARIAN also submits that Judge Sharp's handling of the jury instruction and deliberation phase of this case also violated his Sixth Amendment Rights to an unanimous verdict or to a hung jury. Although BAZARIAN presented this issue to the Eleventh Circuit, the opinion below does not discuss it.

It is clear that a defendant in a federal criminal trial has a Sixth Amendment Right to an unanimous jury verdict. *See Johnson v. Louisiana*, 406 U.S. 356 (1972) and *Apodaca v. Oregon*, 406 U.S. 404 (1972). It is also

clear that specific, additional jury instructions concerning the unanimity requirement are necessary in complicated cases, such as this one, in which the Government charges that a single conspiracy count can be violated in more than one way. *See, e.g., United States v. Beros*, 833 F.2d 455 (3rd Cir. 1987), and *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977).

In *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), the Fifth Circuit reversed Gipson's convictions where the Trial Court incorrectly instructed the jury on the unanimity requirement. In *Gipson*, Count II of the Indictment charged him with selling or receiving a stolen vehicle in Interstate Commerce. During jury deliberation, the jury asked whether Gipson could be found guilty on Count II or could that Count be "broken down". The Trial Judge provided the jury with an additional instruction particularly responsive to the different issues the jury may have been raising through the question. Unfortunately, the Trial Court incorrectly instructed the jury that it did not need to unanimously agree as to any particular act charged in order to find Gipson guilty, instructing the jury instead that the jury could disagree as to whether Gipson received or stored the vehicle as long as all of them concluded that he did one or the other. *Id.* at 456.

In reversing the conviction, the Fifth Circuit, in addition to holding that the Trial Court should have instructed the jury that it had to unanimously agree as to one of the charged acts in order to support a verdict of guilty, focused upon the need for specific instruction as to the constitutional unanimity requirement in cases, like this case, where the Indictment charges that a crime can be committed in more than one way. The *Gipson* Court underscored the difficulty faced by an Appellate Court in reviewing this issue, when it stated, 553 F.2d at 459:

> "The possibility that the jury may have returned a guilty verdict in the face of a substantial rift among the jurors over the facts in the case is, therefore, a

> real one. Because it is impossible to determine whether all of the jurors agreed that the Defendant committed acts falling within one of the two conceptual groupings, we cannot say that the District Court's instruction was harmless beyond a reasonable doubt under *Chapman v. California*, 1967, 386 U.S. 18. 87 S.Ct. 824, 17 L.Ed.2d 705."

The same is true here. Because the Government objected to use of a special verdict form, and because Judge Sharp declined to give one, this Court cannot now precisely determine whether this jury that had on at least two (2) occassions expressed confusion over the unanimity requirement, correctly safeguarded that Constitutional right in reaching its verdict. As in *Gipson*, since the Government has not demonstrated that Judge Sharp's erroneous manner of handling this issue was harmless beyond a reasonable doubt, the convictions must be reversed.

The decision in *United States v. Beros*, 833 F.2d 455 (3rd Cir. 1987) also supports this conclusion. In *Beros*, the Defendant was a Union Official who was indicted for embezzling, stealing, abstracting or converting funds of his Union to his own use. In this regard, one of the Counts of the Indictment could have been established by proof that Beros used a Union Credit Card to pay air fare for himself and his wife to attend a convention, or occupied a hotel suite that cost proportionately more to accommodate his wife, or by remaining at the site of the convention at Union expense for several days at the conclusion of the conference. As in this case, the Trial Court in *Beros* instructed the jury that it had to "agree unanimously upon the particular method, mode or manner that occurred" before it concluded that Beros was guilty of that particular Count. Here, as to Count I, Judge Sharp instructed the jury that it must unanimously agree "upon which of the various offenses the Defendant conspired to commit" before reaching a verdict of guilty.

The *Beros* Court relied upon the decision in *Gipson* and reversed Beros' convictions. In relying upon *Gipson*, the

Beros Court acknowledged that the Trial Judge in *Beros*, unlike the Trial Judge in *Gipson*, did not incorrectly instruct the jury concerning the unanimity requirement. Rather, the *Beros* Trial Judge did not provide sufficient instructions to the jury to insure that the jury comprehended and safeguarded the unanimity requirement. In this regard, Judge Higginbotham, writing for the Third Circuit in *Beros*, concluded that "the principle problem was the possibility that the jury was confused or mistaken regarding its obligation", and that its obligation was to determine, "in light of the allegations made in the Statute charged whether *the potential* for juror confusion existed". (Emphasis in original) 833 F.2d at 461.

In reversing Beros' conviction, the Third Circuit also concluded:

> "We are convinced that the Sixth Amendment requires such unanimity, and we must be certain that the jury was properly instructed to achieve it. . . . We conclude that the circumstances of this case, similar to those of *Gipson*, warranted more specific instructions regarding jury unanimity."

833 F.2d at 462. *See also United States v. Duncan*, 850 F.2d 1104, 1110-15 (6th Cir. 1988).

With respect to the harmless error question, the *Beros* Court concluded that "because there is a significant possibility that this error may have resulted in a non-unanimous verdict in violation of the Sixth Amendment, the District Court's instructions were not harmless beyond a reasonable doubt". 833 F.2d at 463. In this case, as in *Beros*, defense counsel timely objected to the Court's proposed jury instructions and specifically addressed the complexity of the issue presented in this case by requesting use of a special verdict form drafted to allow the Trial Court and all counsel, and eventually this Court, to have a basis to determine whether the jury protected this important Sixth Amendment Right. BAZARIAN also later requested that Judge Sharp poll the jury to determine the basis of their verdict, and Judge Sharp denied

this request as well. Judge Sharp erred in handling the jury's questions without the assistance of counsel and in failing to use a special verdict form and or poll the jury under the particular facts of this case, requiring reversal of all of BAZARIAN's convictions. *See United States v. Coonan*, 839 F.2d 886 (2nd Cir. 1988) where the Second Circuit approved use of special verdict forms to determine the participation of individual Defendants in predicate acts necessary to support racketeering convictions as an example of cases where, like here, it is appropriate for special verdict forms to be used to determine compliance with important Constitutional Rights.

BAZARIAN also contends that Judge Sharp's handling of the jury instruction and deliberation phase of this case also deprived BAZARIAN of his Constitutional Right to a "no verdict" outcome, or a hung jury. In this regard, the jury in this case on two (2) successive days, the fifth and sixth days of deliberation, informed Judge Sharp that it could not render an unanimous decision concerning the charges against BAZARIAN. In response to the second such message from the jury, Judge Sharp assembled the jury and *sua sponte* delivered the *Allen* charge to them in an unrecorded and *ex parte* manner. At no time did Judge Sharp advise the jury that, in addition to the options of returning a guilty or a not guilty verdict available to them, the jury also could simply fail to return any verdict at all.

BAZARIAN submits that he has a Constitutional Right to a hung jury. In *Hyde v. United States*, 225 U.S. 347, 382 (1912), this Court rejected a claim of jury coercion in connection with delivery of a supplemental charge to the jury essentially because the Trial Court in that case also instructed the jury that if "they could not conscientiously and freely agree upon a verdict they would be discharged".

In *United States v. United States Gypsum Co.*, 438 U.S. 422, 459-60 (1978), this Court reversed the convictions in that case at least in part because the Trial Judge had

encroached on the jury's authority and foreclosed a possible no verdict outcome through what amounted to a supplemental jury instruction delivered to the jury foreman in an *ex parte* communication between the judge and the jury foreman following delivery of a message from the jury foreman, on the seventh day of deliberations, that the jury was deadlocked. In reversing the convictions in that case, Mr. Chief Justice Burger, writing for the Court, stated that "any ex parte meeting or communication between the Judge and foreman of a deliberating jury is pregnant with possibilities for error." *Id.*

In *United States v. Arpan*, 861 F.2d 1073, 1076 (8th Cir. 1988), the Eighth Circuit recently reversed a defendant's conviction because the Trial Judge's delivery of a modified *Allen* charge in response to a jury message inquiring what to do if the jury did not have a unanimous decision on a particular count deprived the defendant of the constitutional potential prospect of a hung jury. In so doing, the *Arpan* Court described the potential prospect of a hung jury as "necessarily a constitutional alternative to our system of requiring proof beyond a reasonable doubt". *Id.*

Judge Sharp's handling of the jury deliberation phase in this case deprived BAZARIAN of his Constitutional Right to an unanimous verdict or, in the alternative, to a hung jury. In this case, the jury twice informed Judge Sharp that it was not able to render an unanimous decision as to BAZARIAN. Rather than providing any additional instructions that might help clear away the obvious confusion concerning the unanimity requirement that the jury exhibited through its questions, Judge Sharp simply decided to dynamite this jury through delivery of an *ex parte* and unrecorded modified *Allen* charge. By denying BAZARIAN's request for use of a special verdict form or a poll of the jury to determine compliance with the unanimity requirement, Judge Sharp essentially removed any ability BAZARIAN might otherwise have had to demonstrate prejudice resulting from Judge Sharp's er-

rors. Because a significant possibility exists in this case that Judge Sharp's errors in handling the jury may well have resulted in a non-unanimous verdict in violation of the Sixth Amendment, as in *Beros*, this Court must reverse BAZARIAN's convictions because the Government has not been able to demonstrate that Judge Sharp's errors committed during the jury deliberation phase of this trial were harmless beyond a reasonable doubt. *See* 833 F.2d at 463; *Chapman v. California, supra.*

III. WHETHER THE JURY'S VERDICT IS BASED UPON INSUFFICIENT EVIDENCE?

BAZARIAN also contends that the Government presented insufficient evidence at trial to support his convictions. The Eleventh Circuit concluded otherwise in its opinion in this case, holding that the jury reasonably could have concluded that BAZARIAN knew that the money that would be wired from Florida to Oklahoma to fund BAZARIAN's cashier's checks would come from the proceeds of the Florida Center Bank loan to Pace-Com, and that BAZARIAN knew the role that the cashier's checks would play in the Pace-Com loan transaction. 871 F.2d at 964-65. The Eleventh Circuit's conclusions, however, are unsupported by the evidence to which it referred in its opinion or the evidence presented by the Government at trial.

As set forth above, Count I of the Indictment in this case charged all trial defendants with engaging in a detailed conspiracy to defraud the Florida Center Bank, misapply its funds and essentially take it over through the combination of the loan to be made to a company known as Pace-Com and the purchase of Florida Center Bank's stock by certain defendants and co-conspirators. In support of this charge, the Government presented considerable evidence at trial illustrating that the Florida Center Bank was in desperate financial condition at the time of these transactions, and that the Bank's proposed $30 million loan to Pace-Com was a bad business decision.

Although several trial witnesses criticized the mechanics of the Pace-Com loan, no witness testified that it was illegal *per se*. Rather, the Government witnesses who testified concerning these transactions at trial opined that the transactions became illegal only due to the undisclosed relationship between the making of the Pace-Com loan and the purchase of Florida Center Bank stock. Unfortunately, however, no Government witness testified at trial that BAZARIAN had any knowledge concerning that inter-relationship.

The opinion of the Eleventh Circuit in this case basically agrees with BAZARIAN's contention that no evidence was presented at trial to reveal or allow the jury to infer that BAZARIAN knew that other trial defendants intended to take over the Florida Center Bank through the combination of the Pace-Com loan and the purchase of the bank's stock. 871 F.2d at 964-965. Nevertheless, the Eleventh Circuit affirmed BAZARIAN's conviction by essentially concluding that his provision of two (2) unfunded $5 million cashier's checks resulted in Florida Center Bank repaying those checks with its own money and enabled Pace-Com to fund its loan with Florida Center Bank. BAZARIAN admits that Florida Center Bank ended up funding BAZARIAN's two (2) United Federal $5 million cashier's checks. BAZARIAN submits, however, that no crime occurred as a result of that transaction because BAZARIAN and his bank, United Federal, had the ability to fund the two (2) $5 million cashier's checks at all times, and because those checks were "as good as gold" in the opinion of all trial witnesses who testified about those checks in this case. The fact that Florida Center Bank made a bad business decision does not equate to the conclusion that BAZARIAN conspired to commit bank fraud or misapply the funds of the Florida Center Bank.

It is fundamental that a § 371 Conspiracy cannot be proven unless there is proof of an agreement to commit an offense against the United States. *Ingram v. United*

States, 360 U.S. 672 (1959). In order to prove such an agreement, the Government had to prove that BAZARIAN knowingly agreed to either participate or aid and abet a conspiracy to violate the substantive crimes set forth in Count I of the Indictment. Thus, an essential ingredient of such proof here would have been BAZARIAN's knowledge that his one day loan to Pace-Com would be used to commit a crime because, without such knowledge, the requisite criminal intent cannot be shown to exist. *See Direct Sales Company v. United States*, 319 U.S. 703, 711 (1943).

BAZARIAN maintains that the Government's evidence falls short of the quantum of evidence necessary to sustain his convictions because the Government never presented any evidence whatsoever from which a reasonable jury could find or logically infer that BAZARIAN knew that a "fraud" was about to be perpetrated on the Florida Center Bank. With respect to the issue of the requisite specific intent, the Tenth Circuit, quoting the United States Supreme Court, has held that "the defendant lacks the requisite criminal intent if he does not know the conspiracy's objective, and this knowledge must be shown by clear, unequivocable evidence". *United States v. Dumas*, 688 F.2d 84, 86 (10th Cir. 1982), *quoting Direct Sales Company v. United States*, *supra*, 319 U.S. at 711.

As set forth above, BAZARIAN maintains that the Government did not present any evidence that he knew that the other trial defendants intended to either defraud the Florida Center Bank through the Pace-Com loan, or take it over through the combination of that loan and the stock purchase agreement. The evidence presented at trial established only that BAZARIAN agreed to "rent" Pace-Com the use of $10 million of his money for one day, for a 3% or $300,000.00 fee. BAZARIAN did not know anything about the substance of the loan Florida Center Bank agreed to make to Pace-Com, or the manner in which Pace-Com would repay that loan. Simply put, BAZARIAN had no legal duty to perform any investiga-

tion at all concerning Pace-Com under these circumstances. For all the jury knew, Co-defendant RAPP, the mastermind of the Pace-Com deal, used an unaware BAZARIAN to obtain his loan from the greedy bank directors at Florida Center.

Under all of the foregoing circumstances, the evidence presented at trial is insufficient to support BAZARIAN's conviction on any Count. Accordingly, all such convictions must be reversed.

CONCLUSION

This Court should grant this Petition for a Writ of Certiorari and either reverse the decision of the Eleventh Circuit for insufficient evidence, or reverse the decision and remand this case for a new trial due to the Trial Court's constitutional errors as set forth herein.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-3180

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL RAPP, a/k/a/ MICHAEL HELLERMAN, CHARLES J. BAZARIAN, MARIO RENDA, JOHN A. BODZIAK, JR., WILLIAM SMITH,
Defendants-Appellants.

April 27, 1989

Appeal from the United States District Court
for the Middle District of Florida

Before RONEY, Chief Judge, COX, Circuit Judge, and MORGAN, Senior Circuit Judge.

COX, Circuit Judge:

I.

This is a case about an elaborate financial scheme that hastened the demise of the Florida Center Bank (FCB) and that ultimately led to the convictions from which these appeals are taken. According to the indictment and

the evidence, the plan was two-fold: the board of directors of FCB, whose membership included three of the defendants, would approve a $30 million loan application submitted by PaceCom, a company owned by another of the appellants, and the proceeds of the PaceCom loan would be used as collateral for the loan and as a source of money for the purchase of a substantial block of FCB stock. Each part of the scheme was related to, and depended upon the other.

This conspiracy had its genesis in financial problems faced by Clyde Pitchford, a co-conspirator turned government witness. In the fall of 1985, Pitchford, a stockbroker in Richmond, Virginia, sought money to replenish that which he had stolen from the cash accounts of certain clients.[1] The source to which he turned was Michael Rapp.

While conducting business in Dallas on behalf of the Rex Group, an association of three individuals formed for the purpose of investing. Pitchford was contacted by Rapp, who was responding to a financial resume sent to him by Pitchford. Rapp described the financial opportunities available in the pay telephone business, which, according to Rapp, was a burgeoning industry due to recent deregulation. Rapp offered Pitchford a five million dollar fee if he could obtain a $20 million loan for Pace-Com, Rapp's pay telephone company.

Pitchford was intrigued at the prospect of receiving such an enormous fee He explained Rapp's proposal to Rex Group partner Hugh Wiley and to Ben Cotton and

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[1] At the time of trial, Pitchford was serving a twenty-five year state sentence in Virginia; he had plead guilty to four counts of embezzlement and one count of bank fraud, all of which resulted from his pillage of clients' cash accounts. Pitchford also was indicted along with the appellants as a result of his participation in this conspiracy. In consideration of his guilty plea and cooperation, the government recommended that the federal sentence run concurrent with the state sentence.

Forrest Watson, principals in the Cornerstone Group, an investment firm in Dallas. All were interested. The following day, Rapp, William Smith, who was introduced as president of PaceCom, and their attorney met with members of the Rex and Cornerstone groups to explain the proposed deal in more detail. Initially, Rapp emphasized that his role in the loan transaction must not be revealed because he had served a prison sentence for involvement in a stock fraud swindle. Rapp then divulged his plan in great detail. Eventually, Smith, Cotton, and Pitchford executed a "Memorandum of Understanding" incorporating that which Rapp had explained. According to the memorandum, Cornerstone and Rex would marshal a $19 million loan in favor of PaceCom at a federally insured lending institution, and share the five million dollar fee. The loan would be secured by a $20 million certificate of deposit, as well as 2,000 pay telephones and the profits generated thereby. Interest on the certificate of deposit would be pre-paid. To calm concerns about the legality of the transaction, Rapp agreed to obtain an opinion letter from mutually acceptable counsel stating that the loan comported with all regulations, laws, and guidelines.

The search for a bank that would make such a substantial loan to PaceCom continued over the next few weeks. The task was not an easy one because PaceCom was a fledgling company with a brief and dismal credit history. At the suggestion of mortgage broker Joseph Daddio, Rapp contacted John Bodziak, chairman of FCB's board of directors. Bodziak showed interest in the PaceCom loan; in it, he saw an opportunity to sell his FCB stock holdings, which he unsuccessfully had been attempting to do for some time. Cotton and Wiley met with Bodziak in Florida on October 10, 1985, to discuss Rapp's plan for success in what had become an interrelated loan and stock purchase transaction.

At this meeting, Cotton,[2] on behalf of Cornerstone/Rex and, surreptitiously, Rapp, and Bodziak, for himself, board member Robert Duncan, and minority stockholder Lawrence Whittle, executed an "Option to Purchase Bank Stock." Paragraph 17 of that agreement explicitly sets forth the relationship between the stock purchase and the PaceCom loan; "Cotton and Sellers agree that the motivating reason underwriting [sic] Cotton's acquisition of a majority of the stock in the Institution is the accommodation of the PaceCom transaction." Ownership of 55% of FCB stock, the portion offered in the option, would include the right to name a number of people to FCB's board of directors and would bring an influx of capital into the bank. Thus, the board could be stacked and the capital position strengthened, thereby insuring board approval of the PaceCom loan.

Rapp and Smith began the search for a source of funds to finance PaceCom's purchase of the certificate of deposit that would serve as security for the loan. The more difficult task, however, was securing a favorable opinion letter on the legality of the transactions. Initially, Rapp, Smith, and Bodziak, through Bodziak's attorney, Dominic Massari, hired Palmer Hamilton, a partner in the Mobile, Alabama law firm of Miller, Hamilton, Snider & Odom, to author a favorable letter addressing the merits of certain specific issues involved in the FCB-PaceCom transactions. A large fee was promised if the letter was written forthwith. Despite assurances by Rapp that the stock purchase and the PaceCom loan were not related and a promise that affidavits would be executed to that effect, Hamilton suspected otherwise. Following an investigation of the proposed transaction and the parties involved, Hamilton opined that the loan would be an unsafe and un-

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[2] As the impropriety of the FCB-PaceCom transactions became more apparent, Cotton and his partner Watson, much to the chagrin of the others, began asking questions. Eventually, both were excluded from further participation.

sound banking practice. Rapp and Bodziak were displeased. Eventually, however, they obtained a favorable opinion from a Miami lawyer.

On October 25, 1985, as the self-imposed deadline for consummation of the FCB-PaceCom transaction drew nigh, Rapp, Smith, and Pitchford met with Charles Bazarian at his palatial Oklahoma City, Oklahoma home. Bazarian was joined by Mario Renda, a money broker from New York who was visiting Bazarian for the weekend. Rapp explained that PaceCom wanted to rent $20 million for one day so that it could buy a certificate of deposit to offer as security for FCB's loan to PaceCom. Assurances were given that the money actually never would leave Bazarian's possession. The "rental" of the money would work this way: Bazarian would provide a cashier's check that PaceCom would cash only after enough of the proceeds of the PaceCom loan to fund the check, plus a substantial fee, had been wired to Bazarian's bank account. Ed Mittlestet, president of the United Federal Savings and Loan Association, an institution at which Bazarian maintained an account, agreed to issue the check on the oral promise that the transaction would proceed as Rapp had described.

Rapp also had other preparations to make during those busy days prior to consummation of the transaction. In order to make the loan to PaceCom and to pay the interest on the certificate of deposit, FCB needed an infusion of cash. Rapp, Smith, and their cohorts turned to money brokers—intermediaries who generate deposits for banks. Bodziak, acting alone, approved a $250,000 undersecured loan for PaceCom to pay the brokers' fees. Three and one-half million dollars in deposits were brokered into FCB during the days preceding the closing. In addition, Renda brokered approximately four million dollars for FCB on the day the loan was closed, but after the closing had taken place.

The FCB board of directors met on October 28, 1985. In attendance were all four board members, including Bodziak and Duncan, Pitchford, Wiley, Smith and the Miami lawyer who had written the opinion letter. Rapp was secreted in an Orlando inn, but remained in contact with the others. During the meeting, the discussion turned to the PaceCom loan and the stock purchase. Bodziak presented the stock purchase agreement, and Duncan nominated Pitchford and Wiley to the board. A. Razzak Tai and Sam Murrell, two non-conspiring board members, asked whether there existed any relationship between the Rex Group, represented by Pitchford and Wiley, and PaceCom. Pitchford, Wiley, and Smith executed affidavits declaring that no relationship existed. The hour grew late, so the board adjourned, leaving for the morrow the business of the loan and the stock purchase.

That evening, Bodziak, Pitchford, Wiley, and Smith dined with Rapp, Renda, Renda's attorney and Mittlestet. Renda and Mittlestet were in Orlando to deliver the cashier's checks, which totalled $10 million, as an accommodation to Bazarian. Bodziak complained privately to Pitchford that only a single source of funds had been found for both transactions. He feared that this would reveal the true relationship between the two transactions.

The board meeting resumed the following morning; the election of Pitchford and Wiley to the board was the first order of business. With Pitchford and Wiley as members, the board approved a $30 million loan to PaceCom. Each draw on the loan was to be secured by a 10-year certificate of deposit; interest on the certificate would be prepaid at the beginning of the 10-year term. In lieu of interest, FCB was to receive a percentage of PaceCom's profits over the life of the loan. The loan could not be called into default during the first ten years of its term.

Consummation of the PaceCom loan and the stock transfer was next on the board's agenda. As the closing began, Renda and his attorney waited outside the board-

room. The checks, which Mittlestet had signed prior to his early return to Oklahoma, were turned over to PaceCom. The transaction then proceeded as Rapp had planned. PaceCom, through Smith, bought a five million dollar, 10-year certificate of deposit with the first cashier's check. FCB prepaid all of the interest on the certificate and deposited that amount, approximately three million dollars, into PaceCom's account. Using the certificate as collateral, PaceCom borrowed five million dollars from FCB. The proceeds of the loan also were deposited into PaceCom's account, increasing the balance to $6.8 million.

PaceCom immediately made a second and third draw on its $30 million loan, using funds from its FCB account to purchase two additional certificates of deposit. The interest was deposited into PaceCom's account, as were the proceeds of the two additional five million dollar draws. At the conclusion of the third draw, PaceCom had $10.8 million in its FCB account and had repaid half of the $250,000 indebtedness which it had incurred earlier to pay the money brokers' fees. Bodziak then wired $10.8 million from PaceCom's account to Bazarian's account at United Federal Savings and Loan Association in Oklahoma. Later, Bazarian wired $100,000 to Renda's attorney for the beneficial use of Renda.

No additional draws were made against the loan although $15 million remained available. Instead, attention turned to the stock purchase. Pitchford purchased a five million dollar block of FCB stock, 24.5% of the outstanding shares, with the second cashier's check that Bazarian had provided, but said that the money had come from his personal account. Three million dollars was deposited into FCB's capital account with the remainder of the purchase price being distributed among the shareholders.

Within the two days following the close of the ill-fated board meeting, Bodziak became concerned that the relationship between the PaceCom loan and the stock purchase

could be discovered easily. To hide the true nature of the transactions, he drafted documents purporting to show that Pitchford had borrowed five million dollars from Bazarian. Pitchford signed the false, unenforceable promissory note, but Bazarian refused to do so.

As time passed, Pitchford realized that his financial quandary had not abated; he had received no money for his involvement in the FCB-PaceCom scheme. Instead, he possessed only shares of stock in a failing bank. Pitchford complained to Bodziak, who pacified Pitchford with a $100,000 loan. Later, Pitchford attempted to borrow additional sums from FCB, offering his shares of FCB stock as collateral. By that time, however, FCB had failed, and the Federal Deposit Insurance Corporation had assumed responsibility for the bank's insured debts. Soon thereafter, the improprieties were discovered, and the indictment in this case followed.

II.

Count One of the indictment alleges that each of the appellants conspired, in violation of 18 U.S.C. § 871, to defraud FCB, to misapply its funds, to transport fraudulently obtained money in interstate commerce, to make false entries in the bank's records, to make false representations to it in connection with a loan application, and to use interstate wire or telephone communications systems to further those wrongs. Count Two charges each appellant with executing a scheme to defraud FCB, in violation of 18 U.S.C. § 1344.[3] In Count Three, the appel-

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[3] 18 U.S.C.A. § 1344(a) (West Supp. 1988) provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice to defraud a federally chartered or insured financial institution; or to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

lants are charged with wire fraud, a violation of 18 U.S.C. § 1843.[4] Count Five[5] alleges that Bodziak, aided and abetted by Rapp and Smith, willfully misapplied FCB funds, in violation of 18 U.S.C. § 656.[6] Count Six also alleges that FCB funds willfully were misapplied, but names each of the appellants. In Counts Seven, Eight, and Nine, it is alleged that Bodziak, Rapp, and Smith vio-

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[4] 18 U.S.C.A. § 1343 (1984) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[5] Count four of the indictment, charging that each appellant caused fraudulently obtained money to be transported in interstate commerce, is not relevant to this appeal; each defendant's motion for a judgment of acquittal was granted as to that count.

[6] 18 U.S.C.A. § 656 (1976) provides in pertinent part:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets and securities instrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

lated 18 U.S.C. § 1005,[7] which prohibits the entry of false statements in the books and records of FCB. Finally, Count Ten charges that Bodziak, Rapp, and Smith made a false statement in connection with a loan application, an act prohibited by 18 U.S.C. § 1014.[8] Each substantive count also alleges in the alternative that the persons named aided and abetted the commission of the crime charged therein. *See* 18 U.S.C. § 2 (1969).

Trial began in early January, 1987. Three weeks later, the government completed its presentation of evidence. Judgments of acquittal were entered on Count Four as to all defendants, and Duncan's motion for a judgment of acquittal, which was aimed at all relevant counts, was granted in its entirety. Thereafter, Counts Five and Six were dismissed as to Rapp and Smith, and, on motions of Rapp and Smith, the jury commenced its deliberations as to them. Rapp was adjudged guilty on all remaining counts. Smith was declared guilty on all counts except Count Nine.

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[7] 18 U.S.C.A. § 1005 (1976) reads, in part, as follows:

> Whoever makes any false entry in any book, report, or statement of [any Federal Reserve bank, member bank, national bank or insured bank] with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System shall be fined not more than $5,000 or imprisoned not more than five years, or both.

[8] 18 U.S.C.A. § 1014 (West Supp. 1988) provides in relevant part:

> Whoever knowlingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any . . . loan shall be fined $5,000 or imprisoned not more than two years, or both.

The trial resumed the following day with the remaining defendants presenting their defenses. At the conclusion of that phase of the trial, the motions for judgements of acquittal were renewed. The district judge granted Massari's motion in full. Renda obtained a judgment of acquittal on all relevant substantive counts, but was unsuccessful on the conspiracy count. All other motions were denied.

After more than a week of deliberation, the jury returned its verdicts. Bodziak was found guilty on all counts submitted to the jury, except Count Three. Renda was convicted on Count One. The jury adjudged Bazarian guilty on Counts One, Two, and Six. We now consider the appeal of each convicted defendant, specifically addressing only those issues that merit discussion.

III.

Each appellant contends that the evidence presented at trial is insufficient to support certain of the jury's verdicts. The standard which guides our review of these arguments is whether, viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), substantial evidence exists to support the verdicts. *Hamling v. United States*, 418 U.S. 87, 124, 94 S.Ct. 2887, 2911, 41 L.Ed.2d 590 (1974).

A.

Initially we address Rapp's contention that the evidence is legally insufficient to support his convictions on Counts Seven through Ten. Counts Seven, Eight, and Nine allege that Rapp, with intent to injure and defraud FCB, made, or aided and abetted the making of, certain affidavits executed by William Smith, Clyde Pitchford, and Hugh Wiley, each falsely attesting to the absence

of any financial relationship or interest between PaceCom and Pitchford or Wiley. To substantiate the statutory violations alleged in those counts, the government must prove beyond a reasonable doubt that Rapp *knowingly* and *willfully* made, or directed or authorized the making of, a false entry concerning a material fact in a book or record of FCB with knowledge of its falsity and with the intent to defraud or deceive FCB. *See United States v. Jackson*, 621 F.2d 216, 219 (5th Cir.1980) (setting forth the elements that must be proved to establish a violation of 18 U.S.C. § 1005); *United States v. Walker*, 621 F.2d 168, 165-67 (5th Cir.1980) (regarding aiding and abetting). Count Ten alleges that Rapp caused William Smith to submit a false affidavit to FCB in connection with PaceCom's loan application. A violation of 18 U.S.C. § 1014 is proved by evidence that Rapp *knowingly* and *willfully* authorized or directed Smith's making of the false affidavit with the intent to influence the decision-making process of FCB on the loan application and that the affidavit concerned a material fact. *See United States v. Kelley*, 615 F.2d 378, 380 (5th Cir. 1980) (setting forth the elements necessary to establish a violation of 18 U.S.C. § 1014); *Walker*, 621 F.2d at 165-67.

We conclude, after a careful reading of the evidentiary record, that the jury's verdicts as to Rapp on Counts Seven through Ten are not supported by the required quantum of evidence. The record is devoid of evidence that Rapp knowingly or willfully directed or authorized the making of the affidavits. No witness testified that Rapp specifically directed the affiants to execute the documents or that he had knowledge that affidavits would have to be executed in order to consummate the loan. In fact, there is no evidence that Rapp even knew, prior to reading the indictment, that affidavits had been executed. This case, therefore, is more tenuous than *United States v. Giles*, 800 U.S. 41, 57 S.Ct. 340, 81 L.Ed. 498 (1937),

because Giles specifically knew that the false entries on the bank's ledger necessarily would result from his deliberate action of withholding deposit tickets. *Id.* at 49, 57 S.Ct. at 344.

It is true, as the government argues, that Rapp set in motion the events that led to the closing during which the affidavits were executed and that he wanted concealed the true relationship between PaceCom, the borrower, and Pitchford and Wiley, the investors. Moreover, it is arguable that the execution of the documents reasonably could be foreseen as a natural consequence of the conspiracy. These arguments, however, which are based on *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), compelling as they are, cannot support these verdicts: the government did not request that the jury be instructed relative to vicarious liability under *Pinkerton*, and the court did not give such an instruction.

B.

Bazarian and Renda also challenge the sufficiency of the evidence: both argue that the government failed to present facts from which a reasonable jury could conclude or infer that they had knowledge of the fraudulent objective of the conspiracy. We disagree.

First, the indictment alleges, and the evidence proves, that two of the primary objectives of this detailed conspiracy were to defraud FCB and misapply its funds by covertly pledging as security for the PaceCom loan certificates of deposit purchased with proceeds of the loan, thereby leaving FCB in an essentially unsecured position with respect to the loan, and by purchasing FCB stock with the bank's own money. The appellants misread the indictment when they state that the sole objective was to take over FCB; that was a manner in which the conspiracy was furthered, not an objective. Second, there is ample evidence that proves that Bazarian

and Renda had knowledge of these objectives. During his direct examination, Pitchford testified that "the whole thing, the borrowing against the CD" was discussed with Bazarian and Renda. Further, according to Pitchford, Rapp stated, assuringly, that "there is no catch involved. . . . [W]hen your office notifies you that the fed wire has been received back for your twenty million and your fee, then you release the check. There is no possibility that you won't get your money back." From this testimony alone, the jury reasonably could have concluded that Bazarian and Renda knew that the money that would be wired to Oklahoma to fund the cashier's checks would come from the proceeds of the FCB loan to PaceCom; it strains logic to accept any other interpretation. Moreover, Pitchford's testimony revealed that Bazarian and Renda knew the role which the cashier's checks would play in the PaceCom loan transaction and that the necessary result of such a transaction was that FCB unknowingly would be providing essentially an unsecured, multi-million dollar loan to PaceCom.

Although the evidence may not prove that the appellants knew about the stock purchase aspect of the conspiracy, it does not follow that this fact precludes their convictions. It is well-settled that a conspirator need not know all the details of the conspiracy, *Blumenthal v. United States*, 382 U.S. 539, 557, 68 S.Ct. 248, 256, 92 L.Ed. 154 (1947), nor participate in every aspect of it, *United States v. Guida*, 792 F.2d 1087, 1098 (11th Cir. 1986). Therefore, these convictions stand despite the appellants' claims that they did not know the exact scope of the conspiracy.

IV.

Bazarian and Renda contend further that the district judge prejudicially infringed on their constitutional and statutory rights to be present and to have assistance of counsel at every stage of their criminal trial, *see* U.S.

Const. amend. VI;[9] Fed. R. Crim. P. 43(a),[10] by responding to a written communication from the deliberating injury without first consulting counsel and providing the defendants and their attorneys the honor of being privy to the response.[11]

These are the facts giving rise to this aspect of the appeal. The jury retired to deliberate on February 3, 1987. During the course of its deliberation, the jury sent

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[9] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

[10] Rule 43(a) provides:

> The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

Fed.R.Crim.P. 43(a).

[11] This court has chastised this district judge for similar conduct in two recent cases. In *Bank South Leasing v. Williams*, 778 F.2d 704 (11th Cir. 1985), this judge provided the jury with supplemental written instructions defining estoppel without consulting counsel or affording them an opportunity to be heard. Although this court did not address the merits of this alleged error, we did state that "this conduct on the part of the trial judge was likely improper." *Id.* at 707 n.2. In *United States v. Guida*, 792 F.2d 1087 (11th Cir. 1986), this judge, responding to a request by the jury, allowed the jury to study an unredacted copy of the witness and exhibit list. Counsel was not notified or consulted. This was held to be error, but was adjudged harmless since substantial evidence concerning all of the listed exhibits had been admitted during the trial. *Id.* at 1091-94. Our prior criticism of this improper procedure apparently has gone unheeded.

several written communications to the district judge. On the first three occasions, the judge followed the proper procedure; counsel was informed of the substance of the note and afforded an opportunity to be heard before the judge responded. In handling the fourth question, however, the judge chose a different course. The jury, after five days of deliberations, indicated that it had reached a unanimous verdict as to Bodziak and Wiley, but could not do so as to Bazarian and Renda. Perplexed, it asked: "What should we do from here?" [12] Without consulting counsel, who, we are told, anxiously were awaiting the jury's verdict just outside the courtroom, the judge assembled the jury in an anteroom adjacent to the courtroom [13] and delivered a modified *Allen* [14] charge. Neither counsel nor their clients were present. Only later did they learn of the jury's note and, upon filing a handwritten motion, its substance. At a subsequent in-chambers conference, Bazarian and Renda moved for a mistrial and, alternatively, requested that the jury be reminded, as they had been the day before, that they unanimously must agree on which of the six objects of the conspiracy each defendant conspired to commit. The defendants did not argue, however, that the charge given by the court in response to the note was a misstatement of the law. The judge denied both requests. Twenty-seven hours later the jury returned its unanimous verdicts.

Initially, we explicitly set forth the procedure that properly should be followed by a judge presented with a

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[12] The note, in its entirety, reads as follows:

> We the jury cannot render a unanimous decision on the Counts of Mr. Bazarian or Mr. Renda.
>
> We have decided on the Counts containing Mr. Wiley, and Mr. Bodziak. What should we do from here?

[13] Apparently, this judge's courtroom was occupied by another judge hearing a different case.

[14] *Allen v. United States*, 164 U.S. 492, 501-02, 17 S.Ct. 154, 157-58, 41 L.Ed. 528 (1896).

communication from a deliberating jury. That which follows is simply a restatement of established jurisprudence of which the district judge should have been aware. In *Rogers' v. United States*, 422 U.S. 85, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975), the Supreme Court, citing two of its early twentieth century cases and the Federal Rules of Criminal Procedure, stated that it was clear that a message from a jury should be answered in open court after counsel has been informed of its substance and has been given an opportunity to be heard. *Id.* at 89, 95 S.Ct. at 2094 (citing *Shields v. United States*, 273 U.S. 583, 588-89, 47 S.Ct. 478, 479, 71 L.Ed. 787 (1927); *Fillippon v. Albion Vein State Co.*, 250 U.S. 76, 81, 39 S.Ct. 435, 436, 68 L.Ed. 853 (1919); Fed. R. Crim. P. 48.). *Accord United States v. McDuffie*, 542 F.2d 236, 241 (5th Cir. 1976) ("The procedure that should have been employed is well established. When a communication is received from the jury, counsel should be informed of its substance and afforded an opportunity to be heard before a supplemental charge is given."). There is no justification, therefore, for deviating from this procedure in responding to this jury's communication; the trial court erred by doing so. *See Rogers*, 422 U.S. at 40, 95 S.Ct. at 2095; *McDuffie*, 542 F.2d at 241.

Though error was committed, reversal does not necessarily follow. Rather, we must determine whether this infringement on the appellants' fundamental rights to personal presence and assistance of counsel at all critical stages of their trial is harmless. *Rushen v. Spain*, 464 U.S. 114, 118-19, 104 S.Ct. 453, 455-56, 78 L.Ed.2d 267 (1983); *Rogers*, 422 U.S. at 40, 95 S.Ct. at 2095. We conclude that Bazarian and Renda suffered no actual prejudice as a result of the mishandling of the jury communication; consequently, the error is harmless.[15]

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[15] Because we resolve this issue in this manner, we assume without deciding that this error was of constitutional dimension. *See Rushen*, 464 U.S. at 117 n. 2, 104 S.Ct. at 455 n. 2.

The factual scenario presented here is not unique; this court has reviewed for prejudice other cases in which the trial court, in response to a jury communication, delivered supplemental instructions without notifying or consulting counsel, and in the defendant's absence. In *United States v. McDuffie*, 542 F.2d 236 (5th Cir. 1976), the trial court, on its own initiative and without receiving input from counsel, heeded the jury's request and reinstructed on the meaning of the terms "control" and "possession." *Id.* at 288. Similarly, the trial judges in *United States v. Breedlove*, 576 F.2d 57 (5th Cir. 1978), and *United States v. Betancourt*, 734 F.2d 750 (11th Cir. 1984), without prior consultation, answered substantive legal questions from the jury outside the presence of the defendants and their counsel. *Breedlove*, 576 F.2d at 59; *Betancourt*, 784 F.2d at 759. Other cases involve the mishandling of wholly innocuous requests from the jury. In *United States v. Zielie*, 734 F.2d 1447 (11th Cir. 1984), and *United States v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984), the judges, in the absence of counsel, performed the ministerial task of instructing the jurors that they would have to rely on their own recollection of the evidence since the trial testimony had not yet been transcribed. *Zielie*, 734 F.2d at 1460; *Bascaro*, 742 F.2d at 1354-55. The improper communication in each of these cases was criticized and adjudged erroneous. None of the convictions was reversed, however, because each error was harmless. In *McDuffie*, this court recognized that the judge's response was directly responsive to the jury's question and correctly stated the law; consequently, no prejudice was shown to have resulted. *McDuffie*, 542 F.2d at 241. This court and its predecessor, citing *McDuffie*, also found this reasoning decisive in each of the other cases. *Bascaro*, 742 F.2d at 1855; *Zielie*, 734 F.2d at 1460; *Betancourt*, 734 F.2d at 759; *Breedlove*, 576 F.2d at 60.

Similarly, the trial judge in this case delivered a supplemental instruction in the absence of Bazarian and

Renda without input from their counsel. The only difference between this case and those discussed above is that the supplemental instruction given was a modified-*Allen* charge, which the appellants do not argue was not responsive to the question or was a misstatement of the law. That the *Allen* charge was involved, however, is not a factual difference that renders the communication prejudicial *per se*. Instead, some prejudice must be shown to have resulted from this error.

The appellants argue that the error caused prejudice in three ways. First, they contend that the trial court deprived them of the opportunity to dissuade the court from giving the modified-*Allen* charge and to request that a mistrial be declared. This was not prejudicial, however, for there exists no absolute right to be forewarned before the *Allen* charge is given. *See United States v. Bailey*, 468 F.2d 652, 663-64 (5th Cir. 1972), *adopted on rehearing*, 480 F.2d 518 (1973) (en banc). Moreover, the court listened to the defendants' arguments after the charge, but while the jury was still deliberating, and could have declared a mistrial had he been convinced to do so. Instead, he specifically rejected the defendants' arguments, stating that he would not have declared a mistrial in any event.

The appellants also contend that they suffered prejudice as a result of the court's error in that they did not have the chance to request that the judge respond to the jury's question by giving a different supplemental instruction, one that would remind the jury that they unanimously must agree on which object of the conspiracy the defendant conspired to commit. This argument is not persuasive. The trial court specifically rejected this request in the post-*Allen* charge conference. Additionally, the judge had given this same instruction a day earlier in response to another of the jury's questions.

Finally, Bazarian and Renda argue that the modified-*Allen* charge was confusing. The jury, so the argument

goes, might have believed that the court would have declared a mistrial as to all of the four defendants if unanimous verdicts were not rendered against each of them. This contention, however, was not raised in the court below; rather, the appellants make this argument for the first time on appeal. Thus, the argument will not be considered. *See United States v. Hill*, 622 F.2d 900, 908 (5th Cir. 1980).

Though we do not condone the manner in which the trial court proceeded, we cannot reverse these convictions if the error was not prejudicial. The appellants arguments of prejudice are not persuasive, and no prejudice is apparent to us. Accordingly, the conviction must stand.

V.

Bodziak, Bazarian, and Renda, the defendants adjudged guilty in the second phase of the jury's deliberations, allege separately that the trial was rendered unfair by the court's statement to the jury regarding the sudden midtrial absence of co-defendant Duncan, whose motion for a judgment of acquittal had been granted in its entirety. After the jury returned its verdicts as to Rapp and Smith, and before the remaining defendants began presentation of their defenses, the court gratuitously informed the jurors that it had dismissed the case against Duncan. Specifically, the court stated:

> At the close of the government's case the court found as a matter of law that the government had introduced insufficient evidence for you to find beyond [a] reasonable doubt that Mr. Robert Duncan had done any criminal acts as alleged in the indictment. Therefore, the court has dismissed Mr. Duncan from this suit.

Defendants' counsel moved for a mistrial, arguing that this unsolicited comment, which, so the argument goes, only could be interpreted as an indicaiton that the other

defendants probably were guilty, invaded the exclusive province of the jury and destroyed the presumption of innocence. The court denied the motion and refused counsels' requests that it immediately admonish the jury to draw no inferences from its remarks concerning Duncan.

When a co-defendant has mysteriously vanished from the trial, there exists a genuine risk that his absence subconsciously may affect the jury's assessment of the guilt of the remaining defendants. That possibility is enhanced when the absence occurs in the waning moments of a lengthy trial. Recognizing this, the trial judge decided to prevent curiosity, conjecturing, and speculation by giving a simple and honest statement to the jury conveying the reason for Duncan's departure. Many experienced trial judges think this is the "best, safest and fairest procedure." *See United States v. Beasley*, 519 F.2d 233, 239 (5th Cir.1975), *vacated on other grounds*, 425 U.S. 956, 96 S.Ct. 1736, 48 L.Ed.2d 201 (1976).

It is argued that the court overstepped the bounds of prudence by divulging the precise reason for its dismissal of Duncan—that the government had introduced insufficient evidence upon which to base a conviction. We agree that the court's remarks are suspect, especially in light of the court's refusal to instruct the jury that Duncan's acquittal should not affect the deliberations still facing them. *See United States v. DeLucca*, 630 F.2d 294, 298 (5th Cir.1980). We do not decide, however, whether the statement is improper for, even if it is, the error was harmless: it did not affect any substantial rights of the appellants. *See* Fed.R.Crim.P.52(a).

The presumption of innocence, which the appellants allege was thwarted by the court's actions, is a substantial right indeed! But, the court's decision to inform the jury that the government failed to prove its case against Duncan and its refusal to give an immediate limiting instruction did not affect that right. During

his instructions to the jury at the close of the second phase of the case, the judge instructed the jury, as he had done at the conclusion of the first phase, that the defendants are presumed innocent until proven guilty beyond a reasonable doubt. The jury also was told that its decision should be based solely on the evidence produced at trial and more importantly for present purposes, that the evidence did not include anything that he, the judge, had said during the course of the trial. Finally, he admonished the jury that "the case of each defendant should be considered separately and individually." Although the better practice in this situation is simply to acknowledge a defendant's absence to the jury and instruct that it should not affect their deliberations as to the remaining defendants, *United States v. Barrientos*, 758 F.2d 1152, 1156 (7th Cir.1985); *see DeLucca*, 630 F.2d at 298, the course of action chosen by the court in this case does not amount to reversible error. *See DeLucca*, 680 F.2d at 298-300; *United States v. McCoy*, 539 F.2d 1050, 1064 n. 22 (5th Cir. 1976).

VI.

Based on the foregoing, we reverse Michael Rapp's convictions on Counts Seven through Ten because the evidence is insufficient to support the jury's verdicts. Otherwise, the judgments of the district court are affirmed.[16]

AFFIRMED IN PART; REVERSED IN PART.

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[16] All issues raised by the appellants were given careful consideration. Those not specifically addressed in our opinion do not merit discussion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3180

D.C. Docket No. 86-174

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL RAPP, a/k/a MICHAEL HELLERMAN, CHARLES J. BAZARIAN, MARIO RENDA, JOHN A. BODZIAK, JR., WILLIAM SMITH,
Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

Before RONEY, Chief Judge, COX, Circuit Judge, and MORGAN, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of conviction of the said District Court in these causes

be and the same are hereby AFFIRMED in part and REVERSED in part in accordance with the opinion of this Court.

Entered: April 27, 1989

For the Court:
MIGUEL J. CORTEZ
Clerk

By /s/ Karleen McNoble
Deputy Clerk

Issued as Mandate: May 24, 1989

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

86-174-CR-ORL-18

UNITED STATES OF AMERICA

vs.

CHARLES J. BAZARIAN,
Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date 03-16-87

XX with counsel John O'Donnell

PLEA XX not guilty

FINDING & JUDGMENT

There being a verdict of XX GUILTY.

Defendant has been convicted as charged of the offense of

unlawfully, wilfully, and knowingly conspiring, combining, confederating, and agreeing with other persons to defraud a federally insured financial institution, to embezzle, abstract, purloin, and wilfully misapply the moneys, funds, and credits of federally in-

sured bank, to transport in interstate commerce securities and moneys having a value in excess of $5,000 knowing the same to have been stolen, converted and taken by fraud, to make false entries in the books, reports, and statements of a federally insured bank with intent to injure and defraud said bank and to deceive officers of said bank, the Comptroller of Currency, and the Federal Deposit Insurance Corporation and its agents and examiners, to knowingly make false statements for the purpose of influencing in any way the action of a bank on a loan, to use and cause to be used wire, radio and telephone communications in interstate commerce in the execution of the scheme and artifice to defraud, in violation of Title 18, United States Code, Sections 1344, 656, 2314, 1005, 1014, 1343, and 371, as charged in Count One of the Indictment.

knowingly executing and attempting to execute a scheme and artifice to defraud a federally insured institution in violation of Title 18, United States Code, Sections 1344 and 2, as charged in Count Two of the Indictment.

wilfully misapplying and causing to be wilfully misapplied moneys of a bank with the intent to injure and defraud said bank, in violation of Title 18, United States Code, Section 656 and 2, as charged in Count Six of the Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO

(2) YEARS and a fine of $100,000 as to Count One, and TWO (2) YEARS as to Counts Two and Six to run concurrently to the sentence imposed on Count One.

It Is Further Ordered that defendant remain on bond pending appeal and that execution of commencement of the sentence imposed herein is deferred during the pendency of the appeal.

It Is Further Ordered that the defendant pay an assessment to the United States in the amount of $150.00 pursuant to Title 18, United States Code, Section 3013.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period Offenses committed after 01-01-85.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Supreme Court, U.S.
FILED
SEP 6 1989
JOSEPH F. SPANIOL, JR.

No. 88-2134

In the Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES J. BAZARIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the district court's delivery of a supplemental jury instruction outside of petitioner's presence was harmless error.

2. Whether the court should have required the jury to return a special verdict.

3. Whether the evidence was sufficient to support petitioner's conviction.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2134

CHARLES J. BAZARIAN, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 871 F.2d 957.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a-24a) was entered on April 27, 1989. The petition for a writ of certiorari was filed on June 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was con-

victed of bank fraud, in violation of 18 U.S.C. 1344 (Supp. V 1987); misapplication of bank funds, in violation of 18 U.S.C. 656; and conspiracy to defraud a federally insured bank, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of two years' imprisonment on each count, and he was fined $100,000 on the conspiracy count. The court of appeals affirmed.

1. The evidence at trial showed that Michael Rapp devised a scheme to defraud Florida Center Bank (FCB) in Orlando of millions of dollars through a loan and a stock purchase. Rapp's involvement in the transactions could not be revealed to federal regulators because he had a felony conviction for securities fraud. He therefore hired two men, Clyde Pitchford and Hugh Wiley, to purchase the bank's stock on his behalf. To finance the purchase, Rapp applied for a $30 million interest-free loan from FCB. The nominal borrower was Pace-Com, a fledgling corporation with virtually no assets, a poor credit history, and a straw president, co-defendant Michael Smith.[1] John Bodziak, yet another of Rapp's co-conspirators, was the Chairman of the Board at FCB. He obtained the board's approval for the Pace-Com loan and for the stock purchase. The loan was to be secured by 10-year certificates of deposit purchased from the bank. FCB agreed to prepay the interest on the certificates. Gov't C.A. Br. 3-4, 22.

Petitioner agreed to assist Rapp in purchasing the certificates of deposit needed to set Rapp's scheme in motion. Two days before the Pace-Com loan closing date, Rapp, Smith, and Pitchford met with petitioner in his house in

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[1] In lieu of interest, the bank agreed to accept a portion of Pace-Com's profits, if any. Since Pace-Com was a shell corporation, however, there was no prospect of future profits. Also, the loan could not be called into default for ten years, and Pace-Com was not obligated to pay back any of the principal until that time. In short, the bank was certain to lose money on this high-risk, interest-free loan. Gov't C.A. Br. 22, 24.

Oklahoma. Petitioner introduced Rapp to co-conspirator Mario Renda, a money broker, and Ed Mittlestet, the President of an Oklahoma savings and loan.[2] Rapp explained that he wanted to borrow $20 million for one day, and he promised to pay petitioner $300,000 for arranging the loan. After petitioner and Renda asked many questions about the details of Rapp's plan, Rapp assured petitioner that the money would never leave his hands. According to Rapp's plan, petitioner agreed to provide cashiers checks that would not be cashed by FCB until the proceeds of the Pace-Com loan had been wired from the Florida bank to petitioner's account at Mittlestet's savings and loan in Oklahoma. Gov't C.A. Br. 19.

At petitioner's direction, Mittlestet prepared two $5 million cashiers checks drawn on petitioner's account, which at the time contained only $23,000. Petitioner ordered Mittlestet not to release the checks to Rapp and his associates in Florida until FCB wired $10.3 million into petitioner's account. Mittlestet and Renda then flew to Florida with the checks. At the loan closing, Renda gave the checks to Bodziak. Bodziak used one of the checks to purchase a $5 million certificate of deposit on Pace-Com's behalf. FCB prepaid the interest on the certificate and deposited it in Pace-Com's account. Pursuant to Rapp's agreement with petitioner, however, Bodziak did not cash the $5 million check that he used to purchase the certificate. Gov't C.A. Br. 20-26.

Using the $5 million certificate of deposit as collateral, Pace-Com drew $5 million on its loan. The loan proceeds and the prepaid interest on the certificate totaled

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[2] Rapp, Bodziak, Smith, and Renda were tried together with petitioner and were each convicted of conspiracy and related charges. Wiley was acquitted on all counts. Pitchford pleaded guilty to some of the charges. Mittlestet was not indicted for his role in the scheme.

$6,781,484.81. The bank deposited that sum in Pace-Com's account. Pace-Com then repeated the transaction, withdrawing $5 million from the account to purchase another certificate of deposit, drawing another $5 million on its loan, and depositing both the loan proceeds and the prepaid interest in its account, which already contained the $1.78 million profit from the first transaction. Thus, at the end of the second transaction, Pace-Com had $8,581,618.31 in its account. The transaction was repeated again bringing the total in Pace-Com's account to $10,341,751.81. Although the circular transaction could have been repeated three more times until Pace-Com had drawn the full $30 million, the parties stopped after three draws and moved on to the stock purchase. Gov't C.A. Br. 22-24.

Pitchford and Wiley used the second $5 million cashiers check provided by petitioner to execute the stock purchase. Thereafter, FCB wired $10.3 million from Pace-Com's account to petitioner's account in Oklahoma. After the money was received in Oklahoma, Bodziak cashed the two $5 million cashiers checks, leaving the $300,000 fee in petitioner's account. Petitioner paid Renda $100,000. In short, petitioner netted $200,000 for letting Rapp use two pieces of paper – unfunded $5 million cashiers checks – to execute his scheme to defraud Florida Center Bank of millions of dollars. Gov't C.A. Br. 25-26.

Shortly after Rapp's scheme was completed, FCB failed, and the Federal Deposit Insurance Corporation assumed its liabilities. Gov't C.A. Br. 27.

2. After five days of deliberations, the jury sent the court a note stating that it had reached a verdict as to two defendants, but that it could not reach a unanimous verdict as to petitioner and Renda.[3] The jury then asked,

[3] The jury had already rendered guilty verdicts against Smith and Rapp. The jury indicated in its note that it had now reached a verdict

"What should we do from here?" Without consulting either the government or defense counsel, the court assembled the jury and delivered a modified *Allen* charge.[4]

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as to Bodziak (guilty as to all but one count) and Wiley (not guilty), but that it could not agree as to petitioner and Renda.

[4] See *Allen* v. *United States*, 164 U.S. 492 (1896). The court instructed the jury (Gov't C.A. Br. 69 n.25):

> I am going to read one additional instruction at this time. Members of the jury, I am going to ask you to continue your deliberations in an effort to reach an agreement upon a verdict and dispose of the issues that have not already been resolved in this case. I have a few additional comments that I would like for you to consider. This is an important case. The trial has been extensive in time, effort, money and emotions, and strain both to the defense and the prosecution. If you should fail to agree upon a verdict, the case will be left open and may have to be tried all over again. Obviously another trial would only serve to increase the costs to both sides. There is no reason to believe that this case can be tried again by either side any better or more exhaustively than has been tried before you. Any future jury must be selected in the same manner and from the same source as you were chosen. There is no reason to believe that the case could ever be submitted to twelve men and women who are more conscientious, more capable, or more competent to decide it, or more clearer evidence could be produced. If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are in favor of acquittal, the rest of you should ask yourself again and most thoughtfully whether you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt. Remember at all times that no juror is expected to give up an honest belief he may have as to the weight or effect of the evidence. But after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so. You must also remember that if the evidence in the case fails to establish guilt

None of the parties were present. Thereafter, petitioner was given a copy of the supplemental instruction and he requested a mistrial. While the jury was still deliberating, the court ruled that it would have given the instruction even if it had first consulted counsel, and that it would not have granted, nor would it now grant, a mistrial. The court refused petitioner's request to remind the jury yet a third time of its duty to agree unanimously on the object of the conspiracy. Gov't C.A. Br. 68-72.

3. The court of appeals affirmed. The court rejected petitioner's claim that the evidence was insufficient to show that he had knowlege of the fraudulent objective of the conspiracy—"to defraud FCB and misapply its funds by covertly pledging as security for the PaceCom loan certificates of deposit purchased with proceeds of the loan, thereby leaving FCB in an essentially unsecured position with respect to the loan." Pet. App. 13a. Pitchford had testified that Rapp's scheme of borrowing money against certificates of deposit was fully explained to petitioner, and that Rapp also assured petitioner that his cashiers checks, which would be used to purchase the certificates of deposit, would not be cashed until the loan proceeds were wired into petitioner's account. Petitioner therefore knew that his cashiers checks would be used to defraud FCB into providing essentially an unsecured, multi-million dollar loan to Pace-Com. Pet. App. 14a. The court further held

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beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty. You may be as leisurely in your deliberations as the occasion may require and should take all the time which you feel is necessary. I will ask you now to retire again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the other instructions that I have previously given you. If you again go back and are not able to agree, let me know and I will declare a mistrial.

that petitioner did not have to know about the stock purchase in order to be convicted on the conspiracy count. *Ibid.*

The court of appeals agreed with petitioner that the district court erred when it delivered an *Allen* charge without first consulting counsel and without permitting petitioner or his counsel an opportunity to be present when the supplemental instruction was given. The court also assumed without deciding that the error was of constitutional dimension. Pet. App. 16a-17a & n.15. Nevertheless, the court found that the error was harmless. *Id.* at 17a-20a. The court observed that petitioner did not dispute that the instruction was responsive to the jury's note and that it correctly stated the law. The court rejected petitioner's argument that he was prejudiced because he was not afforded an opportunity to persuade the district court to declare a mistrial instead of sending the jury back for further deliberations. The court of appeals noted that the district court had considered and rejected petitioner's plea for a mistrial after delivering the *Allen* charge but before the jury reached a verdict. The court of appeals also held that petitioner was not prejudiced by the district court's failure to remind the jury once again of its duty to agree unanimously on which object of the conspiracy petitioner conspired to commit. Pet. App. 19a. And finally, the court refused to entertain petitioner's untimely argument that the *Allen* charge may have misled the jury into believing that if it failed to reach a verdict as to any one defendant, a mistrial would be declared as to all defendants. Pet. App. 20a.

ARGUMENT

1. We do not dispute that the district court violated Rule 43 of the Federal Rules of Criminal Procedure when

it delivered the modified *Allen* charge outside of petitioner's presence.[5] That error, however, was clearly harmless, as the court of appeals held. Petitioner does not point to any prejudice that he suffered as a result of the modified *Allen* charge, nor can he. He does not contest the form or the content of the *Allen* charge given by the district court, which was balanced and not unduly coercive. See *Lowenfield* v. *Phelps*, 108 S. Ct. 546, 649-552 (1988) (approving the giving of a modified *Allen* charge). And he had no right to a mistrial when the jury announced that it could not reach a verdict. This was the first time during five days of deliberation that the jury stated that it was unable to agree as to any defendant.[6] Certainly, the decision to send the jury back for further deliberations was not an abuse of discretion. See *Lowenfield* v. *Phelps*, *supra*. Unable to show prejudice, petitioner argues instead (1) that the harmless error rule does not apply to the error at issue here, and (2) that in any case prejudice is not a prerequisite to reversal. Neither of these arguments has merit.

It is well settled that harmless error analysis applies where a trial judge communicates with the jury ex parte,

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[5] Rule 43 provides that the "defendant shall be present * * * at every stage of the trial including the impaneling of the jury and the return of the verdict * * *."

[6] Contrary to petitioner's unsubstantiated assertion (see Pet. 17-19), the jury had not previously announced that it was unable to reach a verdict as to any defendant. See 8 R.A. Doc. Nos. 397, 398, 399, 401, 407. Rather, on one occasion the jury asked, "if we can't come to unanimous agreement on the various offenses listed under [the conspiracy count], shall we give a verdict of not guilty as suggested [in the jury instructions]." 8 R.A. Doc. No. 401. This hypothetical question, which the court answered in part by repeating the unanimity instruction, does not give rise to the inference that the jury was then deadlocked.

in violation of Fed. R. Crim. P. 43. See, *e.g.*, *Rushen* v. *Spain*, 464 U.S. 114, 119-120 (1983); *Rogers* v. *United States*, 422 U.S. 35, 38-40 (1975); *United States* v. *Watchmaker*, 761 F.2d 1459, 1465-1466 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986) (failure to contact defense counsel before instructing the jury to resume deliberations and to try to reach a verdict was harmless error); *United States* v. *Breedlove*, 576 F.2d 57, 59-60 (5th Cir. 1978) (failure to consult counsel is harmless "when the Judge's answer to the jury's inquiry was distinctly responsive to the question, it clearly stated the law, and no prejudice is shown").

Petitioner argues (Pet. 14) that in *Rushen* v. *Spain*, *supra*, this Court warned that giving additional instructions to a jury in the absence of the defendant and his counsel can never be harmless error. Petitioner relies not on any holding of the Court, but on the Court's parenthetical description of a prior case, *Rogers* v. *United States*, *supra*. The Court in *Rushen* characterized the holding of *Rogers* as follows: "although violations of Federal Rule of Criminal Procedure 43 may be harmless error, additional instructions from judge to jury, without notification to defendant or his counsel, is not." *Rushen* v. *Spain*, 464 U.S. at 119 n.4. The language from *Rushen* does not support petitioner's point. It simply notes that the conduct in *Rogers* was held not to be harmless error; it does not suggest that *Rogers* should be read to hold that giving an ex parte instruction to a jury can never be harmless error, no matter how clearly correct or how innocuous the instruction may have been. Nor does *Rogers* itself stand for any such broad principle of per se reversal. In *Rogers*, the Court acknowledged that ex parte communications may be harmless, but it held that in the circumstances of that case, where the supplemental instruction was misleading, reversible error had occurred. 422

U.S. at 40. Nothing in *Rogers* precludes application of the harmless error rule where, as here, a correct supplemental instruction is given.

This Court has repeatedly held that convictions are not set aside for error, whether constitutional or otherwise,[7] in the absence of prejudice. *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983); *Rose* v. *Clark*, 478 U.S. 570, 579-582 (1986). Nor does petitioner's claim gain added force from his effort to characterize the error in this case as a violation of the Sixth Amendment right to counsel. Nonprejudicial restrictions on the right to counsel are usually harmless. See, *e.g.*, *Satterwhite* v. *Texas*, 108 S.Ct. 1792, 1797-1798 (1988); *Strickland* v. *Washington*, 466 U.S. 668, 691-696 (1984); *United States* v. *Morrison*, 449 U.S. 361, 364-365 (1981); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977); *Milton* v. *Wainwright*, 407 U.S. 371, 372-373 (1972); *Snyder* v. *Massachusetts*, 291 U.S. 97, 114-118 (1934). Only a complete deprivation of counsel or a Sixth Amendment violation that pervades the entire proceeding is reversible error per se. See, *e.g.*, *Holloway* v. *Arkansas*, 435 U.S. 475 (1978); *Gideon* v. *Wainwright*, 372 U.S. 335

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[7] This case does not present the question whether constitutional error occurred because even if the test for constitutional harmless error is used, petitioner cannot prevail. Nevertheless, we submit that the error in this case did not constitute a violation of the right either to counsel or to due process. See *United States* v. *Gagnon*, 470 U.S. 522, 526 (1985) (the mere occurrence of an ex parte communication between the court and the jury does not give rise to a constitutional violation); *Rushen* v. *Spain*, *supra*, 464 U.S. at 117-118 n. 2; *id.* at 125-126 (Stevens, J., concurring); *Snyder* v. *Massachusetts*, 291 U.S. 97, 107-108 (1934) ("the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only"). Petitioner and his counsel were given a copy of the instruction after it was delivered and were given an opportunity to suggest changes and to seek a mistrial before the jury returned its verdict. The constitutional standards were therefore satisfied.

(1963). In this case, there was no pervasive deprivation of counsel. Rather, counsel's absence when the modified *Allen* charge was given was but a "short interlude in a complex trial." *United States* v. *Gagnon*, 470 U.S. 522, 527 (1985). Consequently, the absence of concrete prejudice is fatal to petitioner's claim.[8]

Finally, *United States* v. *Ronder*, 639 F.2d 931 (2d Cir. 1981), does not conflict with the decision below, as petitioner suggests (Pet. 19-20). In *Ronder*, the trial court twice gave unduly coercive *Allen* charges without consulting counsel. Calling the question "close," the court of appeals reversed Ronder's conviction because the instructions were both flawed and unresponsive to the jury's questions. *Id.* at 934. Significantly, the court applied harmless error analysis in reaching that result. Accordingly, *Ronder* is not at odds with this case, where a correct instruction was given that appropriately responded to the jury's announcement that it was deadlocked.

2. Petitioner contends (Pet. 21-27) that the district court should have required the jury to return a special verdict identifying which object of the conspiracy he had conspired to commit. But special verdicts have long been disfavored in criminal trials. *United States* v. *Dennis*, 786 F.2d 1029, 1041 (11th Cir. 1986), cert. denied, 481 U.S. 1037 (1987); *United States* v. *Pforzheimer*, 826 F.2d 200, 205 (2d Cir. 1987); *United States* v. *Frezzo Brothers, Inc.*, 602 F.2d 1123, 1129 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *United States* v. *Spock*, 416 F.2d 165, 180-183 (1st Cir. 1969). Indeed, petitioner cites no case reversing a

[8] Nor can prejudice be assumed, as petitioner suggests, simply because the trial judge may have committed similar errors in unrelated cases. *United States* v. *Payner*, 447 U.S. 727 (1980) (remedies cannot be imposed to vindicate violations suffered by others).

conviction for the failure to use a special verdict form.[9] In the absence of a conflict, further review of this claim is not warranted. In any event, the district court adequately protected petitioner's right to a unanimous verdict by twice instructing the jury that it "must unanimously agree upon which of the various offenses the defendant conspired to commit." Gov't C.A. Br. 73. A special verdict would not have protected petitioner further.[10]

3. Petitioner's fact-bound sufficiency claim (Pet. 27-30) was properly rejected by both courts below. The government's proof unequivocally established that petitioner agreed to provide Rapp with two unfunded $5 million cashiers checks so that Rapp could implement his scheme to defraud FCB of millions of dollars. Prior to joining the conspiracy, petitioner and Renda questioned Rapp extensively about the details of the scheme. Gov't C.A. Br. 46-47. Furthermore, petitioner admonished Mittlestet not to hand over the unfunded checks until FCB wired $10.3 million into his Oklahoma account. *Id.* at 47. Accordingly, petitioner knew that to earn his $300,000 fee,

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[9] Special verdicts were not at issue in *United States* v. *Beros*, 833 F.2d 455 (3d Cir. 1987), on which petitioner relies. Nor does that case support petitioner's claim that the unanimity instruction given in this case was defective. In *Beros*, the court held that the instructions were unclear because they stated that the jury must be unanimous with regard to the "method, mode, or manner" employed by the defendants to execute their fraudulent scheme, instead of informing the jury that it must be unanimous with regard to a particular act. The wording that troubled the Third Circuit was not used in the instant case. *Beros* therefore does not help petitioner.

[10] Petitioner's additional claim (Pet. 26) that the modified *Allen* charge deprived him of the possibility of a hung jury if unanimity were not achieved is refuted by the record. The district court concluded its supplemental charge by reminding the jury that it was not required to reach a verdict: "If you again go back and are not able to agree, let me know and I will declare a mistrial." See p. 6, note 5, *supra*.

he did not have to lend any money, but only had to appear to be lending money. In these circumstances, petitioner plainly understood that the Pace-Com loan was fraudulent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

SEPTEMBER 1989

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